Supreme Court, U.S.
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No. 92-1521

In The

Supreme Court of the United States

October Term, 1992

M/V PINE FOREST, *et al.*,

Cross-Petitioners,

v.

NELSON R. RABY, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents disagree with the Questions Presented by Cross-Petitioners, M/V Pine Forest, Delica Shipping, S.A., and Inui Steamship Co., Ltd. The Questions Presented by Cross-Petitioners state that the attorney's fees awarded to plaintiffs were pursuant to the Seaman's Wage Act, 46 U.S.C. § 10313. This is incorrect. Both the district court and the United States Court of Appeals for the Ninth Circuit made the award of attorney's fees and costs as an adjunct to plaintiffs' claims for wages under the General Maritime Law. Neither the district court nor court of appeals made the award of attorney's fees pursuant to 46 U.S.C. § 10313.

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STATEMENT OF THE CASE

A. Proceedings Below.

Respondents disagree with Cross-Petitioners' statements contained therein. The initial complaint sought wages under the General Maritime Law, statutory penalties pursuant to 46 U.S.C. § 10313, and additional tort damages under the General Maritime Law, including attorney's fees and costs.

The defendants state that, " . . . The Ninth Circuit ruled that although the individual plaintiffs had lost on every theory and claim propounded at trial, they were the prevailing parties because they had recovered $267,585 as a result of their suit and they were entitled to that amount under § 10313." Cross-Petitioners are incorrect that " . . . the individual plaintiffs had lost on every theory and claim propounded at trial, . . . ". Plaintiffs sued for their wages and were successful in obtaining $267,585 after the suit was filed. The Cross-Petitioners counterclaimed for a return of these wages, and plaintiffs successfully defended the counterclaim throughout the entire trial. Plaintiffs were successful on their general maritime tort claims for blacklisting on the trial court level which were reversed by the Court of Appeals for the Ninth Circuit, for which they have filed a petition for certiorari with this Court. Cross-Petitioners are incorrect that the trial court ruled that plaintiffs were entitled to their wages, " . . . under § 10313." Neither the trial court nor the Ninth Circuit predicated the award of attorney's fees on 46 U.S.C. § 10313.

B. The International Economic Context of this Dispute.

Respondents disagree with Cross-Petitioners' statements as being both incomplete and, in some instances, completely inaccurate. Cross-Petitioners fail to inform the Court that the Philippine Overseas Employment Administration's primary function is to find shipowners that will hire Filipinos and that the POEA does not protect the rights of seafarers, and that the recruiting industry in the Philippines is fraught with corruption. See Chapman, *Trouble on Board*, 23-29 (ILR Press, Ithaca, 1992). Cross-Petitioners are wrong that the practice of "double bookkeeping" was started by manning agents in the Philippines and other Asian countries in response to "the ITF threat". Double bookkeeping was started by shipowners solely for economic gain in an attempt to gain an unfair competitive advantage over their competitors. Many charter party agreements require that the vessel be enrolled with the International Transport Workers' Federation. Shipowners, in enrolling their ships, agree to pay certain wages and benefits. Shipowners devised the double bookkeeping scheme to be able to comply with their charter party agreements, but nevertheless pay substantially lower salaries than called for in the union contracts in order to maximize their profits. These shipowners find willing allies among the manning agents of the Philippines with the assistance of the Philippine Government that is dependent upon the hard currency these seafarers send home – 80% of their wages which must be paid in U.S. currency to their "allottees" in the Philippines.

Cross-Petitioners did not devise their defense of "the union is evil and made me do it" until subsequent litigation involving a sister ship, the M/V Fir Grove. In the instant litigation involving the M/V Pine Forest, the Cross-Petitioners' defense was solely that the seafarers had agreed to accept the lower wages and therefore they were not bound by the shipping articles. In the subsequent litigation involving the M/V Fir Grove, *Jose v. M/V Fir Grove*, 801 F.Supp. 358 (D.Or. 1992), the Cross-Petitioners coupled this defense with the alleged justification of union interference. The trial court found this argument unpersuasive and that defendants were "motivated solely by economic concerns." See *Jose v. M/V Fir Grove, supra* at 377.

Cross-Petitioners mischaracterize the economic context of the dispute in an attempt to morally justify their conduct which the district court described as follows:

> "The conduct of defendants in the practice of double bookkeeping and in its refusal to pay plaintiffs their rightful wages was fraudulent, intentional, and in bad faith. The seamen were in a very vulnerable position and were easily intimidated." (App. p. 38)
>
> * * *
>
> This court finds that the conduct by defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce and punish the plaintiffs. That such conduct was in complete disregard of the plaintiffs' rights. That defendants' conduct at all times relevant

herein, violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law of the United States to the protection of the courts." (App. p. 41).

CROSS-PETITIONERS' WRIT SHOULD NOT BE GRANTED

Respondents submit that Cross-Petitioners' Writ should not be granted because it does not fit within the criteria of Rule 10 of the Rules of the Supreme Court. The decision of the Court of Appeals for the Ninth Circuit was in strict compliance with the authority and guidelines this Court laid down in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). There are no decisions by any court of appeals in conflict.

The opinions of both the trial court and the court of appeals are clear that the award of attorney's fees was made under the General Maritime Law and the authority of *Vaughan v. Atkinson, supra*, and not under the Seaman's Wage Act, 46 U.S.C. § 10313. The Court of Appeals for the Ninth Circuit held the same as the trial court in this regard, stating:

> "Ordinarily, the prevailing party in a maritime action is not entitled to attorneys' fees. Under the courts' equitable powers, however, a court may award fees when the defendant has forced the plaintiff to 'go to court to get what was plainly owed him'. *Vaughan v. Atkinson*, 369 U.S. 527, 531, 82 S.Ct. 997, 999, 8 L.Ed.2d 88 (1962)."

In *Jose v. M/V Fir Grove, supra,* litigation involving Filipino seamen against a sister vessel of the M/V Pine Forest (with the identical defendants), the trial court awarded attorney's fees and costs in an order dated August 11, 1992. The trial court noted the defendants objected to any award of fees and costs because they were not allowed under the penalty wage statute.

> "Defendants' first objection is that plaintiffs are not entitled to recover fees at all since there is nothing in the penalty wage statute which authorizes such an award. I note that defendants did not raise this objection to plaintiffs' prayer for fees and costs at trial. However, defendants misconstrue my award which was based upon the equitable principles expressed in the Supreme Court's decision in *Vaughan* and not upon the U.S. Shipping Act which formed only part of plaintiffs' wage claim. As noted in my prior opinions in this case, I could retain jurisdiction over plaintiffs' claims for past due wages on the basis of general maritime law, even in the absence of the U.S. Shipping Act."

Cross-Petitioners are deliberately attempting to misconstrue the basis of the attorney's fee award in this instant litigation just as they did in *Jose v. M/V Fir Grove, supra.* Plaintiffs' claims for wages were made under the General Maritime Law as were the claims for attorney's fees and costs.

It is a matter of hornbook law that the obligation to pay wages, just as the obligation to pay maintenance and cure, arises out of the contract of employment, the shipping articles. See Norris, *The Law of Seamen* (4th ed. 1985) § 6:1, "The Employment Contract":

> " . . . The master acts as the agent of the owner, but in accordance with the *general maritime law*, the seaman has a three-fold remedy for his wages, i.e., an action in personam against the master and against the owner, an action in rem against the vessel. The services of seamen are largely of a contractual nature.
>
> * * *
>
> But, even independent of statutes, shipping articles were required to be in writing under the *general maritime law*." (Emphasis added.)

This rule of the General Maritime Law has been codified internationally by ILO Convention No. 22, "Seamen's Articles of Agreement", which requires shipping articles as a matter of international law.

Plaintiffs' cause of action for their wages, and additionally the cause of action under the Seaman's Wage Act for penalties are entirely separate. The joinder of a General Maritime Law claim with a statutory claim does not emasculate the General Maritime Law claim as contended by the defendants. Defendants' strained interpretation of the law would mean that any time a seaman brings a maintenance and cure claim joined with a Jones Act claim, the seaman would not be entitled to any maintenance and cure, much less attorney's fees for the shipowner's failure to pay maintenance and cure, solely because of the existence of the Jones Act that allows recovery for personal injuries. Such is not the law.

Although the Seaman's Wage Act requires the payment of wages, within a certain time frame and under certain conditions, this in no way abrogates the obligation under the General Maritime Law that the shipowner pay

the seaman his wages. The distinctions between the obligation to pay under the General Maritime Law and the imposition of penalties under the Seaman's Wage Act were precisely set forth by the trial court in *Jose v. M/V Fir Grove* where it carefully noted the different legal standards involved in finding a breach of contract versus liability for double wages under the Seaman's Wage Act. See *Jose v. M/V Fir Grove, supra,* at p. 376.

Contrary to the assertions by the defendants, the court did not supplement the statutory remedies afforded by the Seaman's Wage Act. Instead, the court followed the well established General Maritime Law which affords a remedy for intentional, willful, persistent, callous, and bad faith conduct.

The breach of the duty under the shipping articles, whether to pay wages that are plainly due or to pay maintenance and cure, is akin to a tortious breach of contract. As explained by Justice Cardoza in *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 77 L.Ed. 371 (1932):

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties. For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon the tort."

In *Vaughan v. Atkinson, supra,* this Court did not affirm an award of counsel fees to allow cost or fee

shifting, but clearly affirmed the award as an item of *damages*:

"Our question concerns damages."

The general rule that attorney's fees are allowed as an element of *damages* under the court's equitable power is today a matter of hornbook law. As stated by Professor Tetley in *Maritime Liens and Claims* (1st Ed. 1985), at pp. 83-84:

"b) Equity

. . . In *Vaughan v. Atkinson* the Supreme Court proclaimed: 'Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief.' The Court noted that counsel fees have been awarded in equity actions in the past and added:

> 'As we stated in *Sprague v. Ticonic Bank*, 307 U.S. 161, 164, allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.'

Equity was applied in a negligence action by a stevedore company and a longshoreman against the vessel owner in *Bachtel v. Mammoth Bulk Carriers* [605 F.2d 438, 1980 A.M.C. 172 (9th Cir. 1979)]. Relying on the principle stated in *Vaughan v. Atkinson* and on the fact that the conflicts of interest between the longshoreman and the stevedore were eliminated by the 1972 amendments to the *Longshoremen's Compensation Act*, the Court held:

> 'Where the stevedore's pecuniary advantage was secured through the services of counsel

> employed by the longshoreman, the stevedore should be taxed with a proportionate share of the reasonable fee of the longshoreman's counsel.' "

Professor Tetley continues at page 84 and explains that there is an additional ground besides equity for awarding attorney's fees, namely, callous and unreasonable conduct:

> "c) Callous and unreasonable conduct
>
> Besides equity, another ground for awarding attorney's fees in admiralty arises when one party is callous and unreasonable in either taking or defending an action. The considerations are again equitable but here the fees are not awarded as costs but as *damages*, and usually in claims by seamen for wages and maintenance. The leading case is again *Vaughan v. Atkinson*:
>
> > 'In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court and get what was plainly owed him under laws that are centuries old. The default was wilful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance and cure than this one.'
>
> While the dissenting judges held that counsel fees could not be recovered directly as damages, they nevertheless would have granted 'exemplary damages', if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of

> the seaman. In this way, indirect compensation for counsel fees could be made. The case was thus remanded back to the Eastern District Court of Virginia, where generous attorney's fees were awarded."

The failure to pay maintenance, wages and cure has always subjected the shipowner to *damages* in the form of attorney's fees, costs. Indeed, the recovery of attorney's fees and costs has always been expressly authorized by the General Maritime Law in admiralty cases where the defendants' conduct justifies such an award, even in cases that do not deal with maintenance and cure. See *The Apollon*, 6 L.Ed. 111, 115 (1824) (Story, J.).

In *Lewis v. Texaco*, 527 F.2d 921 (2d Cir. 1975), the Second Circuit determined that the reasoning in *Vaughan v. Atkinson, supra*, applied to actions for wage claims under 46 U.S.C. § 10313. On remand, the district court ruled that Texaco was recalcitrant, and had acted in bad faith by failing to pay the plaintiffs their wages. Accordingly, the court awarded attorney's fees to the plaintiffs. *Lewis v. Texaco*, 418 F.Supp. 27 (S.D.N.Y. 1976).

The cases cited by defendants simply are not applicable and deal with a variety of non-admiralty statutory claims, e.g. Trademark Infringement under The Lanham Act, 15 U.S.C. §§ 1051-1127, The Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*, and claims under The Miller Act, 40 U.S.C. § 270, *et seq.* Defendants are unable to point to a single case supporting their contention that *damages* in the form of attorney's fees and costs are not authorized in an admiralty case, because none exist.

Not one of the cases cited by defendants dealt with admiralty matters where the plaintiff enjoys the status as a "ward of the court". Plaintiffs, as wards of the admiralty courts, are entitled to the court's special protection. This special protection has always included the ability to award *damages* in the form of attorney's fees and costs for bad faith and intentional conduct, whether or not that conduct occurred prior to or during the course of the litigation. Indeed, in admiralty cases the award of *damages* in the form of attorney's fees and costs is predicated upon the fact that a defendant's prelitigation conduct "forced plaintiff to hire a lawyer and go to court to get what was plainly owed him." *Vaughan v. Atkinson, supra.*

The recent decision of *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991), does not support defendants' position for numerous reasons. First and most importantly, the Court in *Chambers* does not rely upon or discuss its decision in *Vaughan v. Atkinson*. This is so because the issues presented were completely distinct. *Vaughan* was an admiralty case where attorney's fees and costs are awarded as an item of damages and not for purposes of fee shifting or pursuant to some statutory authority. Secondly, the majority opinion confirms the inherent power of a court to assess attorney's fees as a sanction for a party's bad faith conduct in the course of litigation. Even the dissenting opinions of Justices Kennedy and Renquist acknowledged that sanctions were proper, but opined that the Court should utilize the sanctioning provisions authorized by F.R.C.P. Rule 11 and 28 U.S.C. § 1927 as the proper vehicle for the award. While the dissenting opinions criticize fee shifting for bad faith prelitigation conduct, the dissenters in no way suggest a

modification of the rule of *Vaughan* in an admiralty context.

The Court in *Chambers* was not concerned with the propriety of *damages* awards in the admiralty context. The defendants' attempt to 'bootstrap' the logic of *Chambers* into the realm of the admiralty is quite simply not supportable as a matter of law.

CONCLUSION

The Cross-Petitioners misstate the facts and the law. The cases they cite involving statutory fee awards are in no way related to awards under the General Maritime Law. Neither this Court nor any appellate court has ever suggested that this Court's decisions allowing attorney's fees in admiralty cases in *The Apollon, supra,* or *Vaughan v. Atkinson, supra,* were erroneous. The Ninth Circuit decision followed Supreme Court precedent and was correct in allowing attorney's fees for the shipowner's intentional bad faith conduct in forcing plaintiffs to go to court to obtain their wages and defend the shipowner's counterclaim.

Respectfully submitted,

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